THE CANADIAN CONSTITUTION AND HUMAN RIGHTS

by

FRANK R. SCOTT

FOUR TALKS
FOR CBC RADIO

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I

THE HISTORICAL TRADITION

THE CONSTITUTION of a country grows with the country, as the roots and branches of a tree reach out for greater sunlight and soil. As Canada has travelled the long road from Crown colony through Dominion status to nationhood, and from the hunting stage through the predominantly agricultural period to our present dependence on industry and manufactures, the form and frame of government have been changed to fulfil our growing needs and to reflect our growing interdependence. That process of constitutional adaptation is still going on and will go on into the future. Only in 1946 was our Canadian citizenship fully defined; and our judicial independence, the ending of the appeals from our courts to the Privy Council in England, came only in 1949. Now we are contemplating another and a very important constitutional development—Mr. Diefenbaker's bill for the recognition and protection of human rights and fundamental freedoms. We are asking ourselves just what are the rights we possess as citizens. What do freedom of religion, of the press, of speech and association, mean under Canadian law? Have we any guarantee of equality before the law, or is this just a pious phrase? Is it legal for employers to discriminate between races and religions, or between men and women doing the same job? Above all, is there any value in trying to draw up a bill of rights setting out the freedoms and rights we feel the constitution should protect, or is it wiser to let the law clarify itself slowly and piecemeal as has

been the tradition for so long in England? These are the challenging questions that face us in Canada today and which I wish to discuss with you in this series of talks.

Let me outline briefly for you the ground I intend to cover and how I intend to proceed. In this talk I shall speak of the tradition of freedom and civil liberties that we received in Canada from England, and its development in the British North American colonies down to the creation of modern Canada in 1867. My second talk will be about the British North America Act of 1867, and will discuss the basic ideas of democracy and minority rights that were incorporated into it, as well as noting how certain other ideas of human rights were left out. The third talk will deal with the growth of new concepts of freedom in Canada since 1867; it will explain the role of the courts in preserving civil liberties and will show how new rights to economic security and racial equality have become of special importance. In the fourth and final talk I shall raise the question of a Canadian bill of rights and attempt to show just what can and cannot be expected of the various kinds of bills that have been proposed, including, of course, the one introduced to Parliament in September, 1958, by Mr. Diefenbaker. So although I am dividing the subject into four topics, it is essentially a single thing I am talking about—namely, our Canadian constitution and human rights.

Let us begin, then, with the historical background, out of which have come our basic ideas of freedom. Canada began its rule under the white man first as a French colony and then as an English colony. Since the cession of New France to the Crown of Great Britain occurred in 1763, before the French Revolution, we shall not expect to find, nor do we find, any tradition of political liberty in

French Canada until the British régime began, though, of course, French civil law protected many private rights like the right to property. Thus the origins of our public law relating to civil liberties and parliamentary democracy, even in Quebec, are to be found in British history and experience. While Newfoundland had been British since the fifteenth century, and Nova Scotia since the Treaty of Utrecht in 1713, Canada was not ceded till 1763, and we may take that date as being the chief starting point of our Canadian constitutional development, though we should pay tribute to Nova Scotia for having been the first of the present Canadian provinces to establish an elected legislature, just two hundred years ago.

British-Canadian government, then, began with a whole group of ideas about the monarchy and parliament and elections and independent courts and the rights of Englishmen, ideas which had evolved over centuries of English history. These were ready-made for new colonies to use. But they were ideas which had to be modified in many respects to fit the different conditions of North America. Merely by becoming British subjects, we inherited a great tradition of liberty, but because we were colonial British, that liberty could not be as complete in Canada, at the start, as it was for the subjects of the Crown living in the British Isles. In several ways, therefore, we had to repeat the history of England all over again, in order to complete our freedoms. We had to cut down the power of the governor general as the English cut down the powers of the king, though we never cut his head off. The Canadian development will become clearer if we examine first the general ideas of civil liberty which obtained in eighteenth-century England and then show how we gradually acquired those we had not at first received and added some

of our own that were not even known in the English motherland at the time.

I think the most important single idea we took as part of our British inheritance at the start was that all government is under the law. The eighteenth-century English king, unlike the French king across the Channel, was not an absolute monarch. He ruled under a constitution which, though mostly unwritten, carefully circumscribed his powers. He possessed a wide authority which he could exercise without the need to consult Parliament, called the royal prerogative, and this authority was especially active in colonies before they had achieved responsible government; but its limits could be determined by the courts, and by long custom it could only be exercised after consultation with his ministers. The making of new laws, and the levying of taxes, required the consent of Parliament. Moreover, while the king could not be sued personally in the courts since in legal theory he could do no wrong, every public official was liable to answer in court at the suit of a private citizen for any wrongs committed in his public capacity, and orders of the Crown were no defence. Thus the law of the time stood between the citizen and the king, protecting everyone against the arbitrary use of state power. What Dicey, the great exponent of English constitutional law at the end of the last century, called the 'rule of law', was already established and came to us in principle as part of our constitutional inheritance.

Many great struggles, many sanguinary battles, and many leading cases at common law went to the making of this fundamental concept. Magna Carta was one such event that everyone has heard of: on the field of Runnymede in 1215 King John bowed to the will of his barons and signed the famous charter which has symbolized ever since, and

perhaps to a greater degree than was justified, the supremacy of law over the state and the right of every man not to be taken, imprisoned, outlawed, or banished, except by lawful judgment of his peers or the law of the land. It was long the practice after John's time to require succeeding English kings to confirm the Charter, so that they came to the throne promising to rule according to its principles. Thus there was a kind of compact between the king and his subjects. The Stuart kings in the seventeenth century tried to establish a more absolute dominion; they were met by the Petition of Right in 1628, by the Civil War and the victory of the parliamentary forces under Cromwell, and then by the glorious revolution of 1688. This was the crucial century in the development of English liberties. William and Mary came to the throne on the terms and conditions set out in the Bill of Rights of 1689, a document which preceded the French Declaration of the Rights of Man by a hundred years and which is the forerunner of the American Bill of Rights and of those bills which we are talking about today. Thus while everyone knows that the modern English Parliament is supreme and can repeal any law, even the Bill of Rights, it is not accurate to say that the notion of a fundamental document which binds legislatures and governments is foreign to the British tradition. For the moral force of the principles of government set out in Magna Carta and elsewhere is so strong, so deeply embedded in the hearts of the people, that it restrains the so-called sovereign Parliament just about as effectively as if the principles themselves were actually in a written constitution of the American or Canadian type.

This notion that all public officials are under the law was supported in eighteenth-century England by certain very practical constitutional rules. If the rights of citizens

are to be determined by law and not by the arbitrary will of governors, there must be independent courts to protect those rights and to punish state officials who disregard them. This the English had secured by the appointment of judges for life in the Act of Settlement of 1701. All judges were the king's judges and were appointed by him, but once appointed they were secure in their tenure. We shall see in a moment that we did not take over this principle immediately from England, but had to secure if for ourselves in Canada; nevertheless it stood as a bulwark of liberty in England from the eighteenth century onward and set us an example we were to follow in the nineteenth century. Along with the independence of judges went the idea of an independent legal profession, free to defend any man in open court without fear of reprisal. The spectacle of Thomas Erskine, the great defence counsel in the London of the 1780's and 1790's, defending Tom Paine, author of *The Rights of Man,* John Horne Tooke, and other revolutionary spirits against treason charges at a time when all England was trembling at the sight of the French Revolution raging across the Channel, will for ever stand as a monument to the tradition of the Bar as a champion of civil liberties.

Besides developing independent judges and barristers, the English had worked out other practical ways of helping individuals whose rights were violated. They always paid great attention to remedies as well as to rights. It is fine to be told you have a right to freedom of speech and of the press, and to liberty of the person, but suppose you are illegally marched off to jail by the police—what do you do then? Without a remedy that can be applied quickly your right to freedom will not mean much. You might languish indefinitely in prison like the inmates found in the Bastille

when it fell to the Paris mob on July the fourteenth, 1789. To meet this possibility the English had developed the famous writ of Habeas Corpus. This is a document issued by a judge ordering the jailer to bring before the court the person he has in custody, in order that the judge may make certain the prisoner is lawfully detained. Thus if the arrest was illegal the prisoner is immediately set at liberty. No better instrument than Habeas Corpus exists for preventing the police power from being used in an arbitrary fashion. Taken along with other procedures and principles of English criminal law—such as the rule that no accused can be compelled to give testimony against himself and is presumed innocent until proven guilty—Habeas Corpus is a leading example of a group of legal safeguards for civil liberties which the common law of England had evolved by the eighteenth century, and of which it was justly proud.

I do not wish to leave the impression that there were no, or only few, restrictions on the exercise of fundamental freedoms in the England of this period. The criminal law was much harsher then than now, both with respect to its definitions of crimes like treason and sedition, and to the punishments it provided. Capital punishment was imposed for a multitude of crimes, some so petty as to shock our consciences as we read about them today; for example, a girl of fourteen was sentenced to death by burning in 1777 for hiding some coins, and the death penalty was imposed for the theft of any property worth over a shilling. Religious toleration was still a long way in the future; no Catholics could take degrees at Oxford or Cambridge till 1871. Freedom of conscience was certainly not one of our inherited rights in Canada. Indeed, as we shall see, both Jews and Catholics gained a freedom in Canada long be-

fore it was granted in England. Freedom of the press was well established after 1695. Everyone was free to publish anything without prior censorship, subject only to the possibility of a subsequent action for sedition, blasphemy, or libel—which is substantially the position today. What English law had achieved, most of which we took over into Canada, was not a conception of human rights anything like as complete as we want it today, but certain fundamental notions of government by consent, of the rule of law, and of inalienable rights belonging to every man by natural right and protected by independent courts. This was the live core of the matter; everything else was to stem out from this root, with perhaps two very important exceptions—the freedom of colonies, or colonial independence, and the freedom of minorities, or minority rights. These were missing in the English tradition, and were both achieved in Canada without the necessity of severing the British connection.

Let us now turn to trace the changes and developments in Canadian civil liberties and political freedoms from the beginnings of British rule down to the B.N.A. Act of 1867. This evolution was not uniform across the country. How could it be? Each part of present Canada has its own history of development from colony or territory to full provincial status. Some jurisdictions, like Newfoundland, existed centuries before Confederation; others were created, like Saskatchewan and Alberta, as recently as 1905. The Northwest Territories are still in an early stage of constitutional advance. The growth of settled government and established human rights was tied to movements of population and economic advance, and these varied greatly. By and large, however, you can see certain broad trends which set the pattern that became the basis

of the constitution of 1867, and were to give to Canadian federalism characteristics which sharply distinguish it from other federal states.

In the first place, the acquisition of New France by Britain in 1763 at once posed a series of problems for the British which had not been resolved before. How was a French and Catholic majority in Quebec to be fitted into a constitutional framework of a purely British type, when English law barred all Catholics from public office, was expressed in the English language only, and was radically different from the French private law which the new French-speaking subjects applied in their daily lives? In Nova Scotia a somewhat similar problem had been faced earlier, and a solution had been found. The Treaty of Utrecht allowed the free exercise of the Roman religion. But later, when the stress of war drove out milder methods, the problem was solved by the physical deportation of the Acadians. The French settlements were broken up and dispersed, since they were thought to be a military menace. English public and private law alone remained.

In Quebec, of course, this solution would have been inconceivable as well as intolerable. The French were living in thriving communities and numbered some seventy thousand. The public law, including English criminal law and procedures, was automatically introduced with British sovereignty, but what we sometimes call today the 'French fact' had to be recognized. Canada could not possibly be just the same as England. So three important changes were soon acknowledged. The Treaty of Paris, like the Treaty of Utrecht before it, guaranteed the free exercise of the Roman Catholic religion. Then the Quebec Act of 1774 made the law of Canada, that is to say French law, the basic law to be applied in all matters of property and

civil rights. In addition, a new loyalty oath was devised which Catholics could subscribe to in good conscience and which enabled them to hold public office. Thus very early the French were conceded their religion, their law, and access to governmental posts. They became full citizens. The French language was not formally guaranteed, but after Lower Canada was created in 1792 it was in fact used in the promulgation of the laws, except for a short interval from 1841-8, as it continued to be used in the daily intercourse of the people. After this the idea of separate schools for Catholics and Protestants developed in Lower Canada and by 1863 they had been extended into Ontario. The bicultural nature of Canada became a constitutional principle as it was a social fact. It has remained so ever since. While there were later changes and struggles, particularly over the extension of biculturalism outside Quebec, the concept of minority rights had taken firm root, and something essentially Canadian had been added to the inheritance of English freedoms.

The recognition of minority rights in the Canadas, together with the introduction of representative government through elected assemblies and the growth of free political parties, meant that the foundations were well laid for future building. There was much still to be done, however, before full political freedom could be attained, and without full self-government, without a sense of responsibility in the people for their own destiny, the individual freedoms of speech, of association, and of the press, were incomplete. The great achievement of the British North American colonies in the first half of the nineteenth century was the winning of responsible government. This wrought a major transformation in the theory of the British Empire, and paved the way for that Commonwealth

of freely associated nations which it has now become. Let us see just what this victory meant.

There are, of course, many ways of governing colonies. Small colonies, if not chartered to trading companies like the Hudson's Bay Company or the Company of New France, are usually ruled by a governor sent out for a term of years with instructions from the mother country. Both the French and the British used this method at the start of their colonial development of Canada. The next stage as the colony grows is to create some body to advise the governor, choosing leading members of the colonial society who carry weight in their localities. The governor still rules, but he shares his responsibility. The French colony of New France had reached this stage before the cession to Britain. Then to the governor and his advisory council may be added an assembly elected by the colonists, so that a more popular and democratic influence helps to make the laws. The French never reached this stage, but as we have seen Nova Scotia opened her first assembly in 1758 and the two Canadas achieved theirs in the constitution of 1792. But still the governor was supreme, and was not obliged to do what the assemblies wanted. He could and did veto the laws they tried to pass, if in his opinion they were not desirable. For his authority did not come from below, from the people he was ruling, but from across the seas where sat the imperial government that controlled the whole Empire. Supporting his power and basking in his approval were groups of officials and influential citizens who have been designated the Family Compact, since they all agreed to keep the elected assembly under control and to divide up the spoils of government among themselves.

Responsible government was attained when the governor was compelled to act on the advice of his colonial

council or cabinet and when this body in turn was drawn from the party controlling the assembly. The governor remained a British official appointed in London, but he lost his right of veto and became a mere figure-head and symbol of the Crown. Political power passed to the elected assembly. It was in the year 1848 that this great change took place in our relations with Britain. Nova Scotia again can claim a 'first' in this democratic advance, her governor having conceded the principle of responsible government a short time before Lord Elgin conceded it in the old Province of Canada. The theory, however, was mostly worked out and made inevitable in the Canadas after the rebellions of 1837-8 and Lord Durham's Report. Thus by the middle of the century Canadian self-government had become a reality on all domestic matters; the representatives elected by the people could make the laws they wished in the same manner as their fellow British subjects living in the United Kingdom. We completed in Canada the conquest of the royal power which the English had brought under parliamentary control more than a century earlier. A theoretical power of disallowance of laws remained in the hands of the British government (in fact it remains even in the present constitution) but it fell into disuse. It must be remembered, however, that responsible government did not reach out into the world of international relations; these remained in British hands until after the First World War.

Even before responsible government was secured the Canadians were improving the laws touching certain human rights. Freedom for Roman Catholics came early, as we have seen, because of the existence of French settlements, but a guarantee of freedom of religion for all people, including Jews and others, was first written into a

statute of the Province of Canada in the Freedom of Worship Act of 1851, though it had been accepted in practice from the beginning of British rule. This statute still remains the law of Quebec and has been cited in recent cases involving the Witnesses of Jehovah. The Jews in England could not sit in Parliament until the 1850's, but in Lower Canada as early as 1831 they were declared by statute to be entitled to all the rights and privileges of other British subjects. This Act was necessitated because of the famous case of Ezekiel Hart, who had been elected twice and nominated a third time to represent the City of Three Rivers in the Lower Canadian Assembly, but had been prevented from taking his seat because he could not take the required oath. Another practical step to make Canadian democracy more effective was taken when the various assemblies early in the century adopted laws providing for the payment of their members; this enabled people of smaller means to offer themselves for election and helped to reduce the money-power in politics. The M.P. in England was not granted a stipend until 1911.

One other important protection for civil liberties was worked out in the Canadian colonies prior to Confederation. This was the separation of the judicial from the legislative and executive powers, and the guarantee of judicial independence. You will remember I mentioned earlier that this vital principle was guaranteed in England by the Act of Settlement of 1701. In the early days in Canada, however, judges sat both in the executive and legislative councils and hence could be found on the bench applying and interpreting laws which they had voted for or against in the legislature. Under such conditions it was impossible to avoid charges of partisanship. By a series of reforms in the 1830's and 1840's the English rule was

eventually made operative and judges became independent, so that we have one more instance of Canadian constitutional history repeating at a later date the struggles which went to the making of the English constitution. By the time the B.N.A. Act came to be drafted the principle was clear and was written into our fundamental law, beyond change by Ottawa or any province.

Thus we have seen how Canada before 1867 was rich in experience of liberty and its challenges. We were endowed at the start with many great concepts of freedom, both political and individual, but we had to plant them in new soil and tend them ourselves. Being colonists, we had to travel the difficult road toward independence, and the British settlers, being invaders, had to find a working relationship with another racial and religious group—the French—for which English tradition and law was inadequate. One other racial problem common to both French and English—that of the white man in Canada in his dealings with the native Indian and Eskimo—was not much advanced in this early period beyond the point which the British adopted at the start, namely leaving them under a kind of governmental tutorship on areas reserved for their use. This gap in our concept of human rights still remains to be filled.

This talk has been about our pre-Confederation heritage and experience. In the next talk we shall examine the original constitution of 1867 to see just what it did and did not contain of fundamental freedoms and human rights.

2

THE CONSTITUTION OF 1867 AND HUMAN RIGHTS

On July the first, 1867, Canada's present constitution came into force, and modern Canada was born. By a statute called the British North America Act (we call it the B.N.A. Act for short) the United Kingdom Parliament grouped the old colonies of Nova Scotia, New Brunswick, and the two Canadas, into a single country called, simply, 'Canada'. Thus by a peaceful process, without bloodshed or conquest, and without any sharp breaking of tradition or loyalties, a new state was called upon the stage of history. True, it was still under the protection of the European motherland but it had started on the road to complete independence.

The constitutional law of Canada was much more developed in 1867 than the physical equipment of the country was. There were almost no railways, but there were freely elected legislatures; there were few people, but there were established civil courts with independent judges in them; there was very little industry, but there was a sound tradition of democracy. We saw in my first talk how many constitutional gains had been made between 1763 and 1867, and how many great principles of law had been developed for the protection of minority rights and human rights. In consequence, we find that many rules in the B.N.A. Act are simply a restatement of existing rules, preserving in the constitution of 1867 the ideas which had been worked out in the earlier colonial stage. What was

really new, of course, was the federal system; that is, the division of legislative powers between a central and local governments, so that each would have a kind of sovereignty independent of the other. Canada was the first part of the British Empire to adopt federalism, and the first state in the world to combine federalism with British parliamentary and cabinet government. And the federal principle was itself an essential safeguard for minority rights, since it gave to French Canada for the first time since 1763 an autonomous authority over large sections of Quebec life and law. Biculturalism in Canada now had a stronger constitutional basis.

If you examine the B.N.A. Act from the point of view of civil liberties and human rights, you will find much more in it than most people suppose who have been told that it contains no bill of rights. Look at the preamble, for example, which explains briefly why the Act was passed and what it was aiming at. It starts off by referring to the desire of the provinces to be federally united under the British Crown, and then says we are to have a constitution 'similar in principle to that of the United Kingdom'. In other words, our constitution was to model itself as far as possible on the British. Now Britain at that time was a parliamentary democracy under a constitutional monarch; it had political parties, free elections, freedom of the person, of the press, and of speech, and a tradition of equality before the law for all citizens regardless of race or creed. So this was to be our kind of government too. It is logical to suppose, then, that when the B.N.A. Act says there shall be one parliament for Canada consisting of the Queen, the Senate and the House of Commons, it intends us to have a freely elected parliament of the British type, conducted on the well-established rules of ministerial re-

sponsibility and cabinet government, and responsive to a public opinion which is kept informed by a free press and free speech. So with things like fair trials before independent judges, and so on, the intention obviously was that Canada should maintain all the great traditions of civil liberties, in her law and practice. The preamble of a constitution does not bind parliament as strict rules of law do, and is thus not a substitute for a bill of rights, but it states an ideal or aim which we should pursue in our constitutional development and it tells the judges to interpret the law in a manner favourable to fundamental freedoms.

When you look away from the preamble into the actual text of the B.N.A. Act, you can find even more positive democratic ideas. There is to be one parliament for Canada, and legislatures in each of the provinces. Why? Because of course representative and responsible government were to be carried on. Though the forms of monarchy were maintained, the power of the state was placed under the control of the people. This responsibility of the Canadian citizen for public affairs is implied in Article 21 of the Universal Declaration of Human Rights of the United Nations when it says: 'The will of the people shall be the basis of the authority of government.' Three special rules in the B.N.A. Act protect this principle further. Section 20 states that there shall be a session of Parliament once at least in every year; thus the executive government, or cabinet, cannot carry on for more than a year without summoning Parliament and giving the elected M.P.s a chance to air their grievances and to call the ministers to account. Section 50 of the B.N.A. Act says that every House of Commons lasts five years only, thus guaranteeing a general election at least as often as that; so we are protected from a parliament that might try to keep itself in

session through fear of defeat at the polls. Section 11 provides for a privy council to aid and advise the governor general, thus giving legal basis for the idea that the Crown only acts on advice of ministers. And since these ministers are, in fact, the leaders of the party which controls the House of Commons, they have to answer to that elected House for all their government acts. Similar provisions exist for provincial governments, though they are somewhat freer to change the rules if they wish. Hence the law of our constitution establishes a truly democratic system of government through freely elected parliaments, which is perhaps the most important of all safeguards for civil liberties.

Besides guaranteeing regular elections and regular sessions of Parliament, the B.N.A. Act guarantees fair representation from the provinces in the federal House of Commons. Quebec was given sixty-five seats at Ottawa in 1867, and other provinces were to have a proportionate number based on their populations as decided at each ten-year census. Parliament could not disfranchise a province or prefer one province above another. This ended the unfairness which had existed prior to 1867 in the old Province of Canada, where the Ontario part of the province was at first over-represented, to prevent the French from having a majority, and then under-represented, as Ontario's population grew faster than Quebec's. Since 1867 the principle of representation in accordance with population has been maintained, though its basis is somewhat modified.

These liberties have to do with political matters; they show that all Canadian government was meant to be under democratic control by the people. Other provisions in the B.N.A. Act were designed to protect cultural and minority rights. Two of these are of particular importance. Section

93 gives security to all separate schools, whether Protestant or Roman Catholic, which existed by law at the Union in 1867. I want to stress the words 'by law at the Union' because the constitution did not force separate schools into provinces that did not have them; it merely guaranteed their continuance in provinces that did have them. It froze existing rights, so to speak. Hence some provinces have separate schools and others do not. But if a province that does not have them decides to establish them, it can't abolish them, later, without running the risk of the federal government stepping in at the request of the minority. Ottawa was made the protector of school minorities against possible abuse of provincial powers, even to the point of enabling it to make the school laws for any province that ceased to respect minority rights. It is therefore not true to say that provinces have an exclusive authority over education; under certain circumstances federal school laws would override provincial school laws. The primary responsibility, however, is provincial. Only once in our history has Ottawa come close to using its supreme power over education—in the Manitoba school crisis of the 1890's, about which I shall speak later.

The other important cultural protection in the law of the constitution is the provision guaranteeing the use of the English and French languages. Both may be used in the federal parliament and federal courts, and both must be used in federal statutes; the same guarantees apply to the Quebec courts, statutes, and legislature. All other provinces except Quebec use only English in their legislatures, their courts, and their laws, though there is nothing to stop them using French if they want to. Manitoba and the Northwest Territories were formerly bilingual, but the local legislatures abolished the use of French. The biling-

ualism of Canada is thus only partial in the English-speaking provinces, being confined to the federal laws which apply in them.

Because Quebec's population is predominantly French and even more predominantly Catholic, some people are confused into believing that the province itself, the government structure, can be called Catholic, just as they think Ontario, for instance, for similar reasons, is a Protestant province. This is not true in any constitutional or legal sense. Protestants in Quebec are on the same footing as Catholics; they have the right to their own separate schools, and to an equality of English with French in all provincial and federal laws. Quebec Province thus contains two official cultures, not just one, and its government represents and speaks for Protestants as well as Catholics. There is even a protection in the B.N.A. Act for the English minority in the Eastern Townships of Quebec; the electoral districts there cannot be changed by the Quebec legislature unless the change is approved by a majority of the members from that region. Catholics in Ontario have a right to their own schools and to a French text of all federal laws, though the provincial law is in English only. The government of Ontario belongs to everyone in the province, not just to Protestants. It is clumsy thinking to attribute to the government of a province a religious quality just because a majority of the public officials happen to belong to one faith at a given time. As Mr. Justice Taschereau once said in the Supreme Court, there is no state religion in Canada; no one is obliged to belong to any church.

While no province can properly be said to have a Protestant or a Catholic government, it is true and important to say that provincial autonomy, the freedom of a province to make any laws it likes within its jurisdiction,

is a guarantee of cultural independence for the local populations and especially for Quebec. It must not be forgotten that Confederation gave Quebec more self-government than she had ever had before; it was therefore a kind of release of her people from political domination. As such it had especial value for the preservation of her French culture. Though the Protestant minority in Quebec has rights which must be respected, the laws which closely touch the majority of the people in their daily lives are made by the Quebec legislature and can reflect their traditions and outlook on life. They feel safe in this autonomy, and not unnaturally guard it jealously.

If we look now at those sections of the B.N.A. Act which establish the courts of justice, we find the great principle of judicial independence firmly planted there. Section 96 provides for the federal appointment of all superior-court judges, and section 99 says that they hold office 'during good behaviour'. These simple but historic words prevent the removal of judges for anything but gross misconduct or incapacity; they even make it impossible to oblige them to retire at a stated age. In so far as law can secure it, the citizen is given the assurance that his trial in the superior courts will be conducted before a judge who renders impartial justice without fear of the consequences from any government. In each province judges are chosen from among lawyers who have practised at least ten years in that province, and who therefore are familiar with the provincial laws.

Not all the courts of a province, however, are called 'superior courts'; there are a number of minor courts, like municipal courts and magistrates' courts, where the judges are provincially appointed and have no guaranteed tenure for life. How independent they may be from various pres-

sures will depend upon provincial law and practice. And we now have in Canada a large number of administrative tribunals which are not ordinary courts and do not have judges in them, and which nevertheless decide questions of vital importance to many of us. Licensing authorities of all kinds, people who give and take away liquor licences, for example, workmen's compensation boards, and other government agencies, determine our rights almost as much as courts do, and it is equally important that we get impartial justice from them. This is a problem we have by no means solved yet, though the regular courts have insisted that administrative officials are bound by principles of natural justice in exercising their authority. One part of Mr. Diefenbaker's Bill of Rights is designed to make these principles of natural justice more secure—things like the right to a fair hearing, to consult legal counsel, and so on.

You will notice that it is parliamentary or political rights, and minority rights to the two languages and to separate schools, that are written into the fundamental law. No mention is made of the basic freedoms of religion, of speech, or of the press. Individual rights, as I have already said, are implied by the spirit of the constitution, and we would be departing from the clear intention of the Fathers of Confederation as set out in the preamble if we were to abolish them, but how we restrict them or maintain them depends on the will of our legislatures. For the B.N.A. Act carried into Canada the theory of the sovereignty of parliament, limited by two rules only: first, that minority rights must be respected, and, second, that each type of legislature, federal and provincial, must keep within the sphere of jurisdiction allotted to it. Hence if a province attempts to interfere with a freedom falling within federal jurisdiction, the statute will be unconstitutional; this is

what happened to the Quebec Padlock Act, which was said to invade the field of criminal law belonging to Ottawa. Similarly, a federal invasion of the provincial field would be prevented by the courts. But we are protected in these cases only because the wrong legislature passed the law; the same law if enacted in the other legislature could well be valid. With us, as in England, some group of M.P.'s is capable of taking away our most cherished individual rights; this is the reason why some people want a bill of rights as an amendment to the constitution which will guard us against this possibility and will put further limitations on the notion of parliamentary sovereignty which makes it possible.

There is one rather unusual provision in the B.N.A. Act which must be mentioned when we talk about the sovereignty of our legislatures. This is the power of disallowance, and it applies in practice only to the provincial legislatures. Any law passed by a province can be vetoed in Ottawa within one year. Hence the federal government can keep a watchful eye on provincial behaviour, and has the legal power to stop a provincial government from adopting laws which unjustly restrict or attack minority rights or human rights. Many provincial laws have in fact been disallowed in the past, the latest examples being some of the Social Credit laws in Alberta in 1941. The Fathers of Confederation undoubtedly intended that this power should be used to protect minorities: for example, when Georges Étienne Cartier was asked during the Confederation debates in 1865 what would happen if the French majority in Quebec tried to blot out the English-speaking minority from any representation in the Quebec legislature, he replied that the law could be vetoed. 'I would recommend it myself in case of injustice,' he said. The trouble

with this veto power is that the federal government may be afraid to use it against any large province for fear of political reprisals at the next election. No Quebec or Ontario statute has been disallowed since 1911; the Liberal government refused to disallow the Quebec Padlock Act in 1938, though the Act violated basic human rights and turned out later to be unconstitutional. At the Constitutional Conference held at Ottawa in 1950 every provincial premier wanted the federal veto removed from the constitution, but in my view it should stay there as a possible safeguard for human and minority rights in Canada. That was its original purpose, and that purpose is as important today as it was in 1867.

It is significant that the B.N.A. Act does not mention any race except the Indians. Canadian history records much racial conflict; Lord Durham found two nations warring in the bosom of a single state—a struggle, he said, 'not of principles but of races'. Yet the constitution protected separate schools on the basis of religion and not of race. The language rights cover all races who speak those languages. It was only the Indians who were singled out for special protection in the B.N.A. Act, being made, in effect, wards of the federal government. The Eskimos have been held by the courts to be included in this category. All the rest of us are treated as citizens generally without any particular distinction. Hence, while we have two cultures in Canada, they are not legally determined by race and any immigrant may join either group at his free choice. And since no one is compelled in Canada to give up his own language, religion, or customs, on arrival on our shores, he may associate with other people from his country of origin and maintain his own folkways within our free society. That this is being done is evident across

Canada, which grows increasingly rich in its variety of minority groups which survive as social communities with their own languages and customs, even though they receive no special constitutional protection.

There is another significant characteristic about the B.N.A. Act of 1867. It contains no mention of any economic rights such as are becoming fashionable in modern bills of rights. Nothing is said about property rights, or trade union rights, or social security. Provinces can make laws affecting property, but the kind of law is a matter for provincial choice; indeed, the sovereignty of our legislatures is so great that they can expropriate property without compensation. As Judge Riddell once said, 'The prohibition "thou shalt not steal" has no legal force upon the sovereign body.' We can at least say that our constitution does not write any economic theory into the law; we can change our social system in any way we like by appropriate legislation. Quebec got rid of its old seigniorial system in this way just a century ago. But due to the *laisser-faire* philosophy that existed when the B.N.A. Act was drafted, to the predominance of agriculture at the time, and to the fact that Confederation was largely designed to enable railway promoters and businessmen to expand their activities across the whole continent, the powers of government were well defined for the businessman but were not defined at all for industrial workers (who scarcely existed) or for other needy groups. Things like trade and commerce, banking, bills and notes, interest rates, railways, telegraphs, and other matters of importance to capitalists, are specially mentioned, but the new subjects of legislation that follow in the wake of industrialism have had to be placed in the constitution by judicial interpretation since they were not there to start with. A great many of them, as we shall

see in my next lecture, have been attributed to the provincial governments, with results sometimes unfortunate for the needy and the unemployed. Putting all this another way, we may say that the B.N.A. Act is an old constitution, and shows the marks of its age. We have patched it up with a few amendments, but it came out of the mid-nineteenth-century, pre-industrial age and has to suffice for our needs in this society of large-scale enterprise and international interdependence. Considering its origins, it is remarkable how well it works on the whole. The vast majority of countries of the world have had brand new constitutions since the B.N.A. Act was drafted, less than a hundred years ago.

I have said that the constitution, while showing special concern for the needs of the business community, did not impose any particular economic system upon us. While assuming a free-enterprise society, it defined powers which can be used for economic planning. It did not distribute them, however, as we should probably do it today if we were starting afresh. To take one example, natural resources were left in the hands of the provinces. This means that the principal responsibility for their development rests on provincial governments. Now provinces vary greatly in size and in the quantity and value of their resources. Some parts of the country have developed rapidly while others lag behind. Putting this in human-rights terms, it means that the opportunities for Canadian boys and girls finding jobs and enjoying good health and good education are much greater in some parts of the country than in others. Think of the child being born in Springhill, Nova Scotia, today, with the chief wealth-producer, the coal mine, permanently closed because of the recent disaster. His prospects are bleak! Yet the families there have just

as much need of food and clothing, schools and hospitals, as anybody else. It is not their fault if the mine is exhausted. Mining companies can make provision for the using up of their resources; they can depreciate their assets and save their financial capital for use elsewhere. The depreciation of our human resources is not nearly so well taken care of, and provincial governments may be unable to rehabilitate the displaced workers. No one expects the employer to do it, so who can we turn to? Society as a whole must assume responsibility. This is one of the great unsolved problems in Canadian federalism—the safeguarding of human resources where economic changes inflict particular hardship. The old philosophy of free enterprise works unfairly unless supported by economic planning and social security, since it is much easier for capital to find new employment elsewhere than it is for labour to sell the house, pack up the family, and move perhaps hundreds of miles to seek new work. Yet without new opportunities for satisfactory employment, what use are our civil liberties and fundamental freedoms? Some use, no doubt, for the unemployed can speak their grievances, but the hard economic realities press too closely when hunger knocks at the door. Perhaps the greatest freedom of all is freedom from want, and I think President Roosevelt was right to include it among his four freedoms. We ignore the economic human rights at our peril. Industrialism has cut man off from a food supply that he grows himself. Somehow we have to build a society where work in the factory is as steady and as certain as work on the land used to be. We have not yet achieved this society, and to some extent our constitutional arrangements make it difficult, though I feel sure the trouble lies with our ideas more than with

our laws. Where there is a will, there is usually a constitutional way.

One last word about the original B.N.A. Act. It is something we often forget. Canada is only partly a federal state. A geographically large part, the whole of the Northwest Territories, is a unitary state, where all state authority vests in the federal government. Ottawa alone has the responsibility of governing this vast area; Ottawa alone makes the laws on education, on property and civil rights, and on all the other matters which elsewhere in Canada are in provincial hands. We can say that in the Territories Ottawa is a provincial government as well as a federal government. Human rights in this part are wholly protected by federal law, and no problem of jurisdiction arises. While not many people yet live in this northland, development is increasing rapidly and a future population of considerable size seems assured. Already self-government for the inhabitants has been partially conceded through the creation of the Yukon and the Northwest Territories councils and by representation in Parliament. The Indian and Eskimo peoples come under the jurisdiction of the Indian Affairs Branch of the Department of Citizenship and Immigration; the great majority of Indians actually live inside provinces and not in the territories, but Ottawa has sole responsibility for them. Over the whole of the territories, there is nothing to prevent Canada from enforcing every provision of the Universal Declaration of Human Rights.

My first talk gave the background to the B.N.A. Act, and this one has shown the basic ideas of democracy and minority rights which were adopted in 1867. In the next talk we shall see how our fundamental freedoms have developed in law and practice since Confederation..

3

GROWTH OF FREEDOM CONCEPTS IN CANADA SINCE 1867

I HAVE SHOWN how Canada started on her national life in 1867 with a written constitution containing many democratic ideas but no formal bill of rights. We condensed a lot of British tradition and a lot of our own experience into the B.N.A. Act, and we invented some rules and procedures that had never been tried before. We have lived under this constitution now for nearly a hundred years, through prosperity and depressions and wars. How have we fared from the point of view of civil liberties? Have we more freedom now, or less?

Put this way, the question is too big for a constitutional lawyer to answer. The amount of freedom a person has depends on so many things other than the law. Maybe the television programs we watch do more to make us free or unfree than what is written in the constitution. Continuous watching of commercialized broadcasting might make people very uninterested in freedom of speech or human rights, and our freedoms might wither away because we never wanted to use them. Rights can exist in the law without being used, so you cannot measure the amount of freedom in a country just by reading the law. But what I can say with certainty is that we have made great advances since 1867 in so far as the legal recognition of human rights is concerned. We have enlarged old freedoms and have achieved new ones, though we have by no

means a clean record and still fall short of good standards in many ways.

Let's look at the developments since 1867 in the three main areas that concern us, which I shall call national status, minority rights, and individual rights. First, consider our national status. Since 1867 Canada has moved all the way from self-governing colony to nation. We have now won our political freedom in all national and international affairs. This has been a very gradual process over a number of years (too many years, it seems to me) and the story is well known. Yet no one can say definitely just when colonialism ceased and national status began. Important dates would be 1920, when we signed the Treaty of Versailles and joined the old League of Nations; 1926, when Dominion status was defined in the Balfour Report; 1931, when the Statute of Westminster was passed; 1939, when we issued our first declaration of war; 1946, when we passed our first complete Citizenship Act. I would even throw in an obscure document called the Letters Patent of 1947, which for the first time delegated to our governor general all the powers of the king of England necessary for the government of Canada. We can make war and peace absolutely on our own now, and this is proof enough of independence. But we have no independence day.

Of course this freedom does not mean we are not bound by tradition and by treaty to our allies in the Western world. We are still a member of the Commonwealth, though we could leave it if we chose; we are bound very tightly to our NATO allies, particularly the United States. The hard facts of international life put a limit on the use we can make of our independence; they also warn us to take care that we do not fall from one colonialism

into another. Every kind of freedom is more easily maintained in a world at peace than in one at war. Individual freedom is a product of civilized society, and war—even a cold war—is not a civilized activity.

Some people would argue that today we are still partly a colony because we have to ask the British Parliament to amend certain parts of the B.N.A. Act. This is true enough. As recently as 1951 we had old-age pensions added to the federal powers by an amendment passed in London. Some laws have to be made for Canada by the Parliament in England in which Canadians are not represented. But this condition remains only because we cannot decide to end it. As soon as we agree upon our own method of amending the B.N.A. Act, the British Parliament will gladly consent to sign off. The choice is still ours whenever we want to make it.

What about the second group of freedoms—minority rights? How have they developed since Confederation? Here the picture is not so simple or clear. I pointed out in my second talk that the original constitution guaranteed the two languages, and certain school rights as they stood when the provinces joined the Union. The problem of deciding what those rights were was thrown upon the courts. The first school case arose in New Brunswick: were any separate-school rights guaranteed there? The Privy Council said no, none existed by law at the Union in 1867 even though some schools were in practice run as Catholic schools. The next big case arose in Manitoba: here a separate-school system was set up after the province was formed, but in 1890 was abolished by the legislature after the waves of immigrants began to come in. The Privy Council, overruling our Supreme Court, said that the abolition did not violate any rights guaranteed at the

Union, though it did give rise to an appeal for federal protection. As a matter of fact the Conservative Party at the time, strongly backed by the Catholic bishops, introduced a federal bill to the House of Commons containing a complete new provincial school system for Manitoba, but the Liberals under Laurier opposed it and Laurier won the ensuing election. Even Quebec preferred to back provincial autonomy against federal interference aimed at helping separate schools.

Then in 1913 Ontario tried to restrict the use of French as a language of instruction in the separate schools; this was held to be a valid use of provincial power, since separate schools are based on religion and not on language. But when Ontario tried to take over the schools that disobeyed the law, the Privy Council said this was going too far. So the legal battle ended in a tie and eventually the language restrictions were withdrawn. A case in Quebec in 1928 held that the province could not treat Jews as Protestants for all educational purposes, since a Protestant separate school could not be put in charge of people who are not in fact Protestants. The reverse would be true in Ontario: Catholic separate schools can only be managed by Catholics. Recently in Quebec a very interesting decision in the Court of Appeal held that a parent who had left the Catholic Church and joined the Jehovah's Witnesses had the right to ask that his children should be exempted from religious classes and exercises in the common school, even though the school regulations required attendance at these classes. Here the freedom of parents to choose the religious instruction of their children was held to be of paramount importance in the Quebec school system; it is in fact a human right protected by Quebec law.

I have only time to give the bare bones of these fascin-

ating school questions. Two points of view frequently come into conflict: the claim of the Roman Catholic Church for state support of its parochial schools, which is admitted in the law of the Northwest Territories and five Canadian provinces, and the claim of those Canadians in other provinces who believe, like the Americans or like the French in France, that the state should only support common schools which are open to all children, and that parents wanting religious schools should pay for them privately. Since both Ontario and Quebec have tax-supported separate schools, most Canadians live under this system. Canada being a country of two cultures, there is a cultural argument for separate schools here as well as a religious one. We do not aim at the assimilation of one culture by the other. On the other hand, many people are genuinely worried over the religious and racial hatreds that schools may perpetuate when religious segregation is practised.

Before leaving this question of separate schools I should like to draw certain conclusions. It used to be thought that the Privy Council in England would be a more impartial protector of minority rights than our own Supreme Court, since it was farther removed from the conflicts. The record of the cases seems to establish the contrary. In the Manitoba situation the Supreme Court unanimously—the three Protestant as well as the two Catholic judges—held that the provincial law abolishing separate schools was unconstitutional. The Privy Council supported the province, and precipitated a national crisis. You will note also that it is the provincial governments which have most endangered these minority rights in the past, not Ottawa. Ottawa wrote a separate-school clause into the constitutions of Saskatchewan and Alberta when

creating them in 1905, and has established separate schools for the Northwest Territories. In my opinion human rights are less likely to be curtailed by the federal government than by provinces because Ottawa is more representative of the whole of Canada than any province can be. You must remember this when you consider the usefulness of Mr. Diefenbaker's proposed Bill of Rights, which only tries to restrain the federal parliament and not the provinces, though it is the provinces we need to worry about most. No doubt Ottawa, too, needs to be watched carefully —its government wanted to deport the Japanese-Canadians after the last war, and it played fast and loose with traditional procedures when it arrested suspect members of the spy ring that Gouzenko exposed—but by and large its record is better than that of the provinces.

My last observation on the school cases is this: they bring out the fundamental distinction in our constitutional law between provincial rights and minority rights. Minority rights are rights protected against any legislation, provincial or federal. Only by amending the constitution itself could we change them. They are the beginning of a true bill of rights—the kind which no mere statute can later abolish. Provincial rights, or provincial autonomy as it is often called, are sovereign rights of provincial legislatures to pass whatever laws they like on certain subjects. The more provincial autonomy there is, the less is the protection for minorities inside provinces. The English-language and Protestant schools in Quebec are protected by a limitation on Quebec's autonomy, just as Catholic separate schools in Ontario are protected by a limitation on Ontario's autonomy. On the other hand, as I have pointed out, provincial autonomy for Quebec acts as a powerful guarantee of

French culture against too great a centralization of power at Ottawa.

Now let me turn to the development of individual human rights in Canada since 1867. There is so much to talk about here that I propose to list some accepted changes very briefly, in order to have time for more interesting questions where controversy still goes on. We have now extended the franchise to all men and women over twenty-one; in Saskatchewan the voting age is only eighteen. We have removed all property qualifications from the right to vote, and all racial discrimination except for Indians on reservations. But let us remember that only since the Second World War has this degree of racial equality been admitted in the electoral laws. I am convinced that the existence and work of the United Nations has been the most powerful influence making us get rid of discriminations which used to curtail the right to vote, though many Canadians have worked for years in this good cause. We enacted our own Citizenship Act in 1946 and we can all travel now on a passport which calls us Canadian citizens instead of just British subjects. We still do not know very precisely how many rights go with citizenship; it is possible that the federal parliament might be able to attach to the status of citizen some of the fundamental rights which we are thinking of putting into the bill of rights. One thing we do know, however, and it is rather startling when we think of it, and this is that being a citizen, even by birth, does not save us from the danger of deportation by order-in-council under the War Measures Act. This the courts decided when the federal government began to deport the Japanese-Canadians in 1945. Surely we should want to change this rule in a bill of

rights. I see no reason whatever why the power to deport citizens should be in the hands of any government.

Another kind of freedom in Canada has shown a great advance since 1867. This is the right of association as applied in the field of labour relations. All during the nineteenth century trade unions were fighting for their right to exist and to bargain collectively, but with varying success. In Canada until well after Confederation the legality of trade unions was doubtful; even the federal Trade Union Act of 1872 and the Criminal Code of 1892 did not entirely remove the old notion that unions were combinations in restraint of trade. Gradually unions won greater recognition, but it was not until the 1930's, under the influence of the depression and the American New Deal, that a more positive form of legal protection began to appear. Then the iniquitous Section 98 of the old Criminal Code, passed to aid in the suppression of the Winnipeg general strike of 1919, was repealed, and it was made a crime for employers to fire a worker for trade-union activities. The Second World War brought federal and provincial laws designed to force employers to bargain collectively in good faith with certified unions. Thus Canadian law says—whatever anyone else says—that unions are good institutions that must be accepted by employers. Even this legal recognition has not ended the struggle for public acceptance, as every trade unionist knows, but at least the law has progressed to the point of guaranteeing certain basic rights for workers. In an industrial society, this is an essential protection for human rights.

For the rest of this talk I should like to illustrate some human-rights problems by citing actual cases that have arisen in our courts. Let me take the case of Christie versus the York Corporation, decided in our Supreme

Court in 1940. Christie was a Negro who held a season-ticket for the hockey matches in the Montreal Forum; a lucky man, many people would say. He used to drop in to the Forum tavern for a glass of beer during intermissions. On one occasion the bartender refused to serve him because he was coloured. So here is the all-too-typical situation: the owner of a place of business who invites the public to come in insults a customer by refusing to deal with him on account of his race. Christie sued for damages and won in the first court, but was told by the two higher courts that he had no claim. Only hotels and restaurants in Quebec are obliged to serve everyone. The freedom of commerce, it was said, enabled the tavern-keeper to choose his customers as he liked. The freedom of Christie from racial insult was not found to be protected by the law. And this remains the law of Quebec and, it would seem, of common-law provinces that have not adopted special legislation to change it.

Now you must see here a real difficulty that confronts the law when one kind of freedom conflicts with another. There is a freedom of commerce, and many people value it highly. It carries with it the right to make all contracts connected with the business, and in making a contract each party is usually free to choose whom he will contract with. On the other hand, it is surely not interfering much with freedom of commerce to say that a merchant who opens his doors to the public must treat all his customers without discrimination. The great principle of equality before the law must prevail at some point over the other value of freedom of commerce, and I hope most of my listeners agree with me that the law as laid down in the Christie case should be changed. It has been changed in those two provinces, Ontario and Saskatchewan, which

have adopted what are called fair accommodation practices acts. These are laws which make it an offence to discriminate on grounds of race or creed against any person seeking accommodation or services in any place to which the public is customarily admitted. In other words, public places are for everyone regardless of colour or religion, and not just for that part of the public which the owner of the establishment happens to like. It is strange that we have taken so long in Canada to bring our law to this reasonable and humane position, and it is surely time that all provinces followed this lead and brought their law into line with this essential concept of human rights. Ontario has gone even further. Last year it set up an Anti-discrimination Commission. This is a body charged with the duty of advising the minister of labour on the working of several statutes aimed at eliminating discrimination, and with developing an educational program designed to inform the public about discriminatory practices. This is an experiment we shall all watch with great interest. The modern way of handling cases of discrimination is not to try to send someone to prison the first time an offence is committed, but rather to investigate the matter quietly, have a talk with the people concerned, and try to persuade them to change their attitudes. Much of the colour bar depends not on real conviction, but on habit and ignorance.

Very similar to the new fair accommodation practices acts are the fair employment practices acts. These acts make it an offence to discriminate in giving employment, on grounds of colour or creed. They apply to trade unions as well as other employers. We now have a federal statute of this kind, covering all federal services, like railways and communications, and provincial statutes in Nova Scotia, New Brunswick, Ontario, Manitoba, Saskatchewan, and

British Columbia. Here we have an example of how human rights can be built up piecemeal, one jurisdiction at a time; the trouble with this approach is that it leaves large gaps in the law so that citizens must be treated as equals in some parts of the country but may be divided into first- and second-class citizens in other places. Why should Canadian citizens suffer a loss of status when they move from Ontario into Quebec or into Alberta? The United States Constitution is superior to ours in this respect; its fourteenth amendment guarantees to every person in every state the 'equal protection of the laws', and the fifteenth amendment prohibits discrimination between voters on grounds of race or colour. Contrast the holding in the Canadian case of Cunningham versus Tomey Homma, which upheld a British Columbia statute barring all Japanese, whether naturalized or not, from the right to vote. While this statute is now repealed, it remains true that provinces today can discriminate in elections against citizens on grounds of race: it is part of the province's power to amend its constitution. I should like to see this power taken away by a bill of rights.

Let's look now at some of the cases touching freedom of religion that have come before the courts recently. Many of these have arisen out of the activities of the Witnesses of Jehovah, but we face other problems presented by the Doukhobors and the Hutterites. In Quebec, especially, the Jehovah's Witnesses suffered some years ago what Judge Bertrand in the Saumur case said was 'a veritable religious persecution'. The City of Montreal, for instance, launched over a thousand cases against the Witnesses on petty charges of distributing literature or peddling without a licence, and every single one of the cases had to be withdrawn eventually, as the arrests were without legal founda-

tion. In the Boucher case a liberal definition of sedition by the Supreme Court freed the Witnesses from the charge that their pamphlet *Quebec's Burning Hate* was seditious. In the Chaput case three Quebec provincial policemen, who had broken up a peaceful service being conducted by a minister of the Witnesses in a private house, were compelled to pay damages, though they had acted under orders from a superior officer. Even the police should know it is a crime to disturb religious worship; here it was the police, and not the Witnesses, who were committing the crime. This case warns us that we shall not be secure in our civil liberties in Canada so long as our police forces contain ignorant, brutal, or high-handed men. I could cite numerous cases where our courts have expressed grave concern at the behaviour of the police, whether it was the R.C.M.P., the provincial police, or the municipal police. We neglect this portion of the state machinery at our peril, for the police are an essential part of the administration of justice and the part which most frequently comes in contact with the citizen. The police state starts to grow in the police force.

Other religious groups in Canada present us with further problems of civil liberties. The question always is, how far must toleration go? When can the state step in and prohibit a practice claimed to be part of the religious observance of the group? Suppose parents do not believe in blood-transfusions: can the state take the child off to hospital against the parents' wish and give it the transfusion? I think the right of the child to life is superior to the right of parents to practise their religion by depriving the child of this medical care. Suppose the parents, like the Doukhobors, do not believe in sending their children to our schools: can we forcibly break up the family and re-

move the children to a boarding-school? This is being done in British Columbia. If we heard that the Russians were taking children from their homes and putting them into state schools we would be very shocked. Or take the case of the Hutterites in Alberta: have they the right to buy land like everybody else, and so to go on enlarging the brotherhoods in which they live? Or can we forbid this kind of ownership in order to leave more room for private farming? Holding land in common is as much a part of the Hutterite religion as distributing literature is to the Witnesses of Jehovah. Yet Alberta is restricting communal land-ownership of the Hutterites. Have Canadian citizens not the right to practise a kind of peaceful Christian communism if they want to? The early Christians, we are told in the Bible, lived this way. On the other hand, the economic power gained by Hutterite brotherhoods frightens ordinary farmers who also want to live their kind of life. So we see again the clash of one right with another. The art of good government is to sort out these rights and to restrain one where it seems to interfere too much with another. Only by training ourselves in understanding and mutual forbearance can this be done without creating resentment and hostility.

This period of our history, from 1867 to the present day, has brought to light another important rule of constitutional law which greatly affects our civil liberties. This is known as the doctrine of emergency powers. If war or insurrection threatens, the federal government can proclaim the War Measures Act, which immediately concentrates a very large number of powers in the hands of the federal cabinet. People can be imprisoned or deported without trial, press censorship can be imposed, political parties can be proscribed, and property can be confiscated,

merely by order-in-council without consulting Parliament. Indeed, we may say that almost all our fundamental freedoms are then at the mercy of the party in power. We have had experience of this in two world wars. We all know the reason for this: in time of war the safety of the state comes first. Yet I think we should watch these emergency powers very carefully to see that they are not greater than they need be. I have said before that I see no need for a power to deport citizens. Yet Mr. Diefenbaker's draft Bill of Rights does not remove this power. Even in war-time certain freedoms can and should be preserved, otherwise we may lose our rich inheritance of freedom in the very process of fighting to protect it.

These examples I have given of situations involving human rights teach us that the subject is always new. The constant changes going on in society bring back old problems in new forms. Hence the truth in the well-known phrase that eternal vigilance is the price of liberty. Even if we adopt a good bill of rights, we do not end the battle for fundamental freedoms. We merely give ourselves another weapon with which to fight. But weapons are useful in this as in other conflicts, and the forces of freedom are stronger when they have good law on their side. What this good new law might be, what kinds of bills of rights we might choose to adopt, will be the subject of my next and final talk.

4

A BILL OF RIGHTS FOR ALL CANADIANS

In my first three lectures, I traced the origins and development of civil liberties and human rights in Canada. We saw that there is much in the B.N.A. Act which guarantees, or implies, these rights. We saw also that there are many particular statutes in Canada which secure special rights, such as the right to collective bargaining for trade unions, or the right to enter public places without discrimination because of race or religion. And when examining all these laws we saw that our human rights are protected in three ways: some of them by provisions in the B.N.A. Act, some of them by federal statutes, and some by provincial statutes. And as if this were not already complicated enough, we found there are many different kinds of rights to be protected, and that different rules have to be worked out which will be appropriate to each. So don't be surprised to find that while it is easy enough to say we should have a bill of rights, it is not at all easy to decide just how many rights are to go into the bill, or just what constitutional effect we give to the bill when we adopt it.

In thinking about a bill of rights, let's first of all make some simple distinctions. Let's separate bills which declare rights from bills which protect them by law. A bill may be a solemn declaration of rights without any legal effect. It may just simply say, as the opening words of Mr. Diefenbaker's proposed Bill actually do say (and I now quote from Section 2):

> It is hereby recognized and declared that in Canada there have always existed and shall continue to exist the following human rights and fundamental freedoms, namely, . . .

and then follows a list of the well-known rights to life, liberty, security of the person, and so on. This is the kind of declaration which the French National Assembly adopted in 1789 in its famous Declaration of the Rights of Man, and which the United Nations adopted in 1948 in the Universal Declaration of Human Rights. Mr. Diefenbaker's Bill goes a little farther than this as I shall show in a moment, but such declarations have as their prime purpose not the enactment of a strict legal rule which the courts can enforce but a statement of principles which are to guide the courts and the legislatures in the development of the laws. They are directives of social policy, or, to use the United Nations phrase, 'a common standard of achievement for all peoples and nations'.

I think such declarations have great value. They make public and precise the vague yearning for liberty which I believe to be inherent in all human beings. They can be taught in schools, referred to in legal argument before the courts, and quoted in after-dinner speeches. But they fall far short of those bills of rights which lay down rules binding on courts or legislatures. This kind, which I call a true bill of rights, has legal as well as moral force. A law is a command of the state which must be obeyed, and which the power of the state will enforce through courts. A right set out in a legal rule establishes legal relationships which cannot be changed except by an amendment of the law itself. A declaration of rights could not stop the deportation of Canadian citizens under the War Measures Act. A true bill of rights could, for it re-

duces the powers of government, and stops the state from taking action which violates the bill's provisions.

When we start thinking about a true bill of rights, we must make more distinctions. Since Canada is a federal state, there are three kinds of bill we might adopt. We can have one which, like Mr. Diefenbaker's, only attempts to cover the field of federal jurisdiction. Or we can have one like the existing Saskatchewan Bill of Rights, enacted by the provincial legislature. Or we can make an amendment to the B.N.A. Act which will cover the whole of Canada, and will place certain freedoms beyond the reach of any legislature. Like the existing school-rights and language-rights in the B.N.A. Act, such freedoms would be entrenched in the fundamental law. This is the American kind of bill of rights, and the kind found in many modern constitutions. This is in my opinion the best kind, and the only kind we can properly call a bill of rights for all Canadians.

Now let's look at each of these three kinds of bill in turn and see what we can expect from them in practical terms. It will be convenient to start with Mr. Diefenbaker's Bill since it is to be a federal statute dealing only with federal matters. What does it actually try to do? How much protection will it give us that we have not got already?

Well—the Bill now before Parliament is more of a declaration of rights than a positive legal protection for rights. But it does say some important things, and it contains a fine list of rights. For instance, it declares that in Canada the following rights have always existed and shall continue to exist:

> (a) the right of the individual to life, liberty, security of the person, and enjoyment of property, and the

right not to be deprived thereof except by due process of law,

(b) the right of the individual to protection of the law without discrimination by reason of race, national origin, colour, religion, or sex,

(c) freedom of religion,

(d) freedom of speech,

(e) freedom of assembly and association, and

(f) freedom of the press.

Now here we have a pithy enumeration of certain basic rights. Let's not argue over the statement that they have always existed in Canada, because they certainly have not, as my previous talks have shown. Freedom of religion had to be fought for and is still causing difficulties with Jehovah's Witnesses, Doukhobors, and Hutterites. Freedom of speech and of the press did not exist in Quebec while the Padlock Act was on the statute books. Freedom of association was not much use to trade unions until the law forced employers to recognize them. And that freedom can scarcely be said to exist in Newfoundland so long as Mr. Smallwood's recent law against the International Woodworkers' Association remains in force. Once again, we see a provincial legislature using its powers to curtail a traditional right—the right to choose whatever association you wish to belong to. The equal protection of the law without discrimination by reason of race was not much use to the Japanese-Canadians the federal government was deporting in 1945. You cannot rewrite Canadian history, or any other, by Act of Parliament. But I do not wish to be legalistic, so let's go on. After declaring that these rights exist, the Bill proceeds to order all federal laws to be construed and applied so as not to take away these rights. This is an order to the judges who interpret the law. In future, according to this Bill, they must apparent-

ly interpret every federal law in such a way as not to violate the freedoms mentioned. Certain other rights are then listed and given the same protection, such as the right to a fair hearing before an impartial court, the right to consult a lawyer, and the right not to be subjected to any cruel, inhuman, or degrading treatment or punishment. It all sounds very encouraging. But what does it really mean?

I regret that I don't think it means much as a matter of law. I just do not think it has amended all the laws that now exist which are contrary to it—and there are many. The present Criminal Code provides such punishments as whipping and hanging. I think these are cruel, inhuman, and degrading punishments. But I think they will continue to be meted out by judges even if the Bill of Rights becomes law. So, too, I think the racial restrictions in our present immigration laws will continue. The Indians in Canada will surely not be placed on the same footing as other citizens by this Bill. Moreover it is clear that the Bill will not stand up against a future Act of Parliament contradicting it, for, as I pointed out earlier, the sovereignty of Parliament means that a later statute always overrules a previous one if there is a conflict of rules. So we have no protection for the future at all. Further, the Bill does not attempt to restrain the provincial legislatures in any way, and we have seen that our greatest dangers come from the provinces. Finally, the Bill ceases to apply entirely if the War Measures Act is proclaimed in an emergency. So what benefit do we get from it? It certainly declares that rights exist, but it does not seem to enlarge them in any way. It does not protect the nation against violations by statute law nor the individual against violation by other citizens. It tells the courts to interpret future laws liberally, but future laws will speak for them-

selves. Even Mr. Diefenbaker's majority cannot dictate to future parliaments by today's statute.

Can this present Bill be improved? Can we put some teeth into it? I think Parliament could go much further if it wished. For instance, it could make more use of its criminal-law power to protect new freedoms. Racial discrimination could be made a crime, just as the firing of a worker for trade-union activities was made a crime. It is a crime to disturb a religious ceremony, as was done by the police in the Chaput case; it could be made a crime to disturb other types of peaceful meeting. But the criminal law is a clumsy weapon at best, and not suitable for the protection of some of the fundamental rights. What is needed is protection against legislation that takes the rights away, as the Padlock Act in Quebec took them away; this Act was held invalid, but the federal Parliament could probably pass a similar law. In war-time it certainly could. We have to restrict parliamentary sovereignty. Now if Parliament wants to restrain its own powers it could by joint address of the Senate and House of Commons ask the United Kingdom Parliament to amend the B.N.A. Act accordingly. Since only federal jurisdiction is to be affected, the provinces would not need to be consulted. Some part of the present federal sovereignty would be handed back to Westminster.

I am not specially urging that these things be done; I am pointing out that if they were done the bill of rights on a purely federal basis would be more effective than Mr. Diefenbaker's is. Otherwise we have a purely declaratory bill that may fool us into thinking we have achieved something real when we have actually achieved little but a fine statement of aspirations and hopes. Would it not be good

to do a more thorough job, if we are going to do anything at all?

Now let us look at the meaning of a purely provincial bill of rights, like the Saskatchewan one. The Saskatchewan Bill does not attempt to limit the Saskatchewan legislature, nor does it tell the courts how to interpret laws. The Bill could be repealed tomorrow, or overruled by a later Saskatchewan law. What it does is to create a number of new provincial offences. It says that anyone violating any of the rights listed in the Bill shall be liable to be fined in the Saskatchewan courts. People who are interfered with in the exercise of their rights can bring suit or take an injunction against those who troubled them. This, too, sounds very nice and seems to give a legal foundation for fundamental freedoms. In some degree it probably does strengthen human rights. But the difficulty is to decide how many of the rights which are protected are within the jurisdiction of the Saskatchewan legislature. The Bill has not been finally tested in the courts, and it may turn out to be unconstitutional in whole or in part. For we still do not know how many of the human rights are under provincial law and how many are under federal law. The Supreme Court in the Saumur case, dealing with the distribution of pamphlets in Quebec City, and the Birks case dealing with the closing of stores in Montreal on Catholic holidays, and the Padlock Act case, have clarified some points, but we shall have to wait a long time to find out all the answers unless the law is sent into the courts by what is called a reference case. Reference cases are often used to find answers to constitutional questions, but governments hestitate to use them unless they want to evade some ticklish political situation.

I am not opposed to provincial bills of rights, and I

think Saskatchewan was taking a progressive step when it enacted this Bill. All the American states have bills of rights in their constitutions, but these are of the stricter type which limit the state legislatures. Alberta once passed a bill of rights, but it was so tied up with Social Credit policies that the Privy Council threw it out. Other provinces content themselves with piecemeal legislation designed to protect one right at a time. Even Saskatchewan passed a Fair Employment Practices Act and a Fair Accommodation Practices Act *after* adopting the Bill of Rights. This shows they wanted to be on firm ground in these matters. So long as jurisdiction over human rights is uncertain, either a federal bill like Mr. Diefenbaker's or a provincial bill like Saskatchewan's leaves many questions unanswered. It is hard to protect something by law when you do not know whom it belongs to.

This is why my personal preference is for a bill of rights which is placed in the B.N.A. Act alongside the language-rights and school-rights which are already there. Once entrenched in the constitution, no legislature, federal or provincial, can take the rights away. They are safe until we amend the constitution again, and we would not be likely to do that. What are the problems involved in this procedure?

Well, the first problem, of course, is the problem of getting agreement to make such an amendment. In his speech introducing his Bill Mr. Diefenbaker talked about this, and said that 'the experience of eighty years indicates very clearly that the provinces, jealous of their jurisdiction, would not support a constitutional amendment applicable to themselves'. So his Bill is confined to federal matters. Mr. Pearson, on the other hand, urged that an effort be made to secure the co-operation and support of the pro-

vinces, and Mr. Argue, speaking for the CCF Party, proposed that steps should be taken to see that the B.N.A. Act itself should be amended. No one has suggested that the federal parliament attempt to secure an amendment in the United Kingdom binding provinces without first winning their consent. On an amendment of this kind, where popular approval is so important, I feel sure that we ought to try to achieve the maximum support across Canada. This might not be as difficult as Mr. Diefenbaker thinks. For the experience with provinces in the past was of quite a different sort: it had to do with matters of finance or jurisdiction which appeared to centralize more power in Ottawa. A bill of rights would not centralize more power in Ottawa. On the contrary, it would deprive Ottawa, equally with the provinces, of the power to make laws restricting fundamental freedoms. It would therefore secure the rights of individuals in every province. We do not know how provinces would respond to an appeal to change the constitution in this way, since they have never been asked before. If the change is desirable, is it not worth trying?

Another problem about an amendment to the constitution, apart from provincial consent, is that of deciding what to put into the amendment. How many rights do we want to entrench? Answering this question forces us to distinguish several kinds of rights. There are, for instance, the well-known freedoms like freedom of religion, of speech, of the press, and of association. These would certainly be included, and if we did no more we would have made a great advance. Then the right to equal protection of the law, without discrimination because of race or creed, seems to belong in the amendment, and possibly some rights to personal freedom and to fair trials before indepen-

dent courts. But once we begin to think of other human rights like the right to work, or the right to social security and education—rights which are properly considered along with the older, more traditional ones—we run into difficulties. For these rights require positive legislation by governments. On these matters we want the state to do something, whereas on the other freedoms we want the state to do nothing, to leave freedom alone. Some freedoms must be protected against the state; others must be protected with the aid of the state by having it pass appropriate laws. Those rights which must be protected against state action are, in my opinion, the ones most appropriate for inclusion in a constitutional amendment. So a bill of rights in the constitution will likely be shorter than one which is a mere declaration of good principles of government. On the other hand, many modern constitutions such as those of Pakistan and India include both types of rights, the economic and social rights as well as political rights. The economic rights are listed as guides to legislation and as standards by which to measure state policy. Arguments can be made for either kind of bill, but if we are going to put anything into the constitution I hope we shall put in economic and cultural rights as well as the basic freedoms. We live in the age of the positive state, not the negative state, and it is important that we keep before us the democratic goals toward which all state power should be aimed.

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